87-322

Supreme Court, U.S.
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Case Number _____

IN THE

Supreme Court of the United States

October, 1987 TERM

CHASE REVEL, INC., d/b/a ENTREPRENEUR MAGAZINE,
Petitioner,

vs.

J.F. STRAW, d/b/a BUSINESS OPPORTUNITIES DIGEST,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

* * * * * *

PETITION FOR A WRIT OF CERTIORARI

* * * * * *

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Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1.

Whether J.F. Straw should have been classified as a limited purpose public figure so as to require a clear and convincing showing of actual malice for him to recover damages from a media defendant.

2.

Whether a review of the entire record of the case would demonstrate any constitutionally permissible basis for an award of any type in favor of J.F. Straw.

STATEMENT PURSUANT TO RULE 28.1

All parent, subsidiary, and affiliated companies related to Chase Revel, Inc. are as follows:

Entrepreneur Group, Inc.
Entrepreneur, Inc.
Entrepreneur List Rentals, Inc.
Entrepreneur's Travel Club, Inc.
Chase Productions, Inc.
Start-a-Business Stores, Inc.
Pinnacle Productions, Inc.
Revelwood Consulting, Inc.

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PARTIES TO THE PROCEEDING

The parties to this proceeding are those listed in the caption of the case noted on the cover of this Petition, to-wit:

J.F. Straw, d/b/a Business Opportunities Digest, and

Chase Revel, Inc., d/b/a Entreprencur Magazine.

TABLE OF CONTENTS

Questions presented for review 2

Parties to the Proceeding 2

Table of Contents 2

Table of Authorities 3

Opinions of the Court Below 4

Statement of Jurisdiction 4

Applicable Constitutional and Statutory Provisions 5

Statement of the Case and Basis for Original Federal Jurisdiction 6

Summary of Argument 9

Argument and Citation of Authority 10

I. THE MEDIA PLAINTIFF, J.F. STRAW SHOULD HAVE BEEN CLASSIFIED AS A LIMITED PURPOSE PUBLIC FIGURE SO AS TO REQUIRE A CLEAR AND CONVINCING SHOWING OF ACTUAL MALICE FOR HIM TO RECOVER DAMAGES FROM A MEDIA DEFENDANT.

II. A REVIEW OF THE ENTIRE RECORD OF THIS CASE DEMONSTRATES THAT THERE IS NO CONSTITUTIONALLY PERMISSIBLE BASIS FOR AN AWARD OF ANY TYPE IN FAVOR OF THE PLAINTIFF.

Conclusion 18

Certificate of Service 19

Appendix 20

TABLE OF AUTHORITIES

I. CASES

Curtis Publishing Company vs. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967) 10

Dun and Bradstreet, Inc. vs. Greenmoss Builders, Inc., 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed. 2d 593 (1985) 13

Gertz vs. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1874) 9, 10, 11, 12, 14, 16, 17, 18
Greenbelt Co-operative Publishing Association, Inc. vs. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed. 2d 6 (1970)

Harris vs. Tomczack, 94 F.R.D. 687 (1982) 11

New York Times Company vs. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) 10, 15, 17

Rosenbloom vs. Metro Media, Inc., 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed. 2d 296 (1971) 15

J.F. Straw d/b/a Business Opportunities Digest vs. Chase Revel, Inc. d/b/a Entrepreneur Magazine, _____ F. 2d _____ (11th Cir. 1987) (Slip Op., p. 2119) (Number 86-8524) 4, 14, 20

Time, Inc. vs. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed. 2d 154 (1976) 9, 11, 12, 13, 16

Time, Inc. vs. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed. 2d 45 (1971) 15

Wolston vs. Readers Digest Association, Inc., 443 U.S. 157 99 S.Ct. 2701, 61 L.Ed. 2d 450 (1979) 9, 11, 12, 16

Constitutional Provisions:

United States Constitution Amendment 1 ..... 5, 16

United States Constitution Amendment 14 (1) 5, 16

Statutes:

28 U.S.C. Section 1254 (1) 5

28 U.S.C. Section 1441 (a) 6

Books:

American Heritage Dictionary, Page 414 (Houghton Mifflin, 1969) 16

OPINIONS OF THE COURT BELOW

The only reported opinion generated by a lower Court in this case, is that of the Court of Appeals of the Eleventh Circuit, to-wit:

J.F. Straw, d/b/a Business Opportunities Digest, plaintiff/appellee, vs. Chase Revel, Inc., d/b/a Entrepreneur Magazine, defendant/appellant, _____ F. 2d _____ (11th Cir. 1987) (Slip Op., p. 2119) (Number 86-8524.) (Appendix p. 20).

STATEMENT OF JURISDICTION

I.

The Judgement of the Court of Appeals affirming in part and remanding in part the decision of the District Court was entered on March 27, 1987.

2.

The Order denying the Petition of Chase Revel, Inc. for rehearing and its suggestion for rehearing en banc was denied on May 8, 1987.

3.

This Court has jurisdiction to review the Judgement of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. Section 1254 (1).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

1.

U.S. Constitution Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2.

U.S. Constitution Amendment 14 Section 1

All persons born or naturalized in the United States, and subject to the juridiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3.

28 U.S.C. Section 1254 (1)

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By a Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

4.

28 U.S.C. Section 1441 (a)

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the District Court of the United States for the district and division embracing the place where such action is pending.

STATEMENT OF THE CASE AND BASIS FOR ORIGINAL FEDERAL JURISDICTION

I.

This case was initially filed by J.F. Straw, in the Superior Court of Whitfield County, Georgia, in 1983. Due to the fact that the parties are citizens of different States and the amount in controversy exceeds $10,000.00, the defendant timely removed the action to the United States District Court for the Northern District of Georgia, Rome Division, pursuant to 28 U.S.C. Section 1441. The case was set for trial and was tried by the District Court sitting with a jury on March 31, and April 1, 1986. After the trial of the case, the jury returned a verdict in favor of J.F. Straw, d/b/a Business Opportunities Digest, and against Chase Revel, Inc., d/b/a Entrepreneur Magazine, in the amount of $25,000.00 compensatory damages and $100,000.00 in punitive damages. (App, p. 34).

After the District Court's denial of several post trial motions (App, p. 32) Chase Revel, Inc. filed its Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit on July 11, 1986. The matter was argued before the Court of Appeals for the Eleventh Circuit on December 17, 1986. A decision affirming in part and remanding in part the decision of the trial Court was issued on March 22, 1987 (App, p. 20). The Court of Appeals denied Chase Revel, Inc.'s Petition for Rehear-

ing and Suggestion for rehearing en banc on May 8, 1987. (App, p. 30).

The case is presently before this Court on a Petition for a Writ of Certiorari filed by Chase Revel, Inc.

II.

This case arose out of the publication of an editorial comment in the December, 1982 edition of Entrepreneur Magazine. The text of the editorial comment published in Entrepreneur Magazine reads as follows:

CAVEAT EMPTOR

> When we started Entrepreneur Magazine about ten years ago, practically nothing existed in our field. Now there are hundreds of publications. However, most offer very little help to anyone. The majority don't have any value and go out of business very quickly. A few steal our material, but our attorneys stop them.
>
> However, one has somehow survived even though it offers the least of any business publication. It is called Business Opportunities Digest and is published in some town in Tennessee by a man of unknown credentials: Mr. J.F. Straw.
>
> It appears he subscribes to various city newspapers and extracts his "opportunities" from their classified sections or accepts payment from people to editorialize their business opportunities. Either way, you would be much further ahead to read the classified business opportunities in your newspaper yourself. Especially for the price difference. Straw charges $36.00 for twelve four-page issues. Buyer beware. (PL. Ex. 1)

It is this editorial comment which J.F. Straw claims as being libelous. One of the motivations behind the publication of the allegedly libelous article was in response to Straw's own publication of a disparaging editorial comment concerning Chase Revel, Inc., and the business affairs of the American Entrepreneur's Association in Straw's own publication, Business Opportunities Digest.

The article written by Straw and published in Straw's newsletter read as follows:

> Over the past month I have received a number of solicitations to participate in the multi level marketing program of the American Entrepreneur's Association. To those of you who sent me those solicitations and to any of you who may be considering entering that plan, THEY ARE IN BANKRUPTCY. In early April Chase Revel, the founder of American Entrepreneur's Association declared his company bankrupt and supposedly began firing those management people who he claimed were responsible.
>
> Whether Revel is personally responsible or not, the company is in bankruptcy proceedings. Therefore you're taking a substantial risk by dealing with them. A word to the wise is sufficient. (PL. Ex. 3)

After the publication of the editorial in Entrepreneur Magazine, J.F. Straw, through his counsel, demanded a retraction of the editorial comment (PL. Ex. 2). Due to the editorial and opinion nature of the comment, Entrepreneur Magazine refused to retract the statement which Straw claimed to be libelous.

Straw filed his suit against Chase Revel in the Superior Court of Whitfield County, Georgia, on November 23, 1983 and Chase Revel removed the action to the United States District Court for the Northern District of Georgia, Rome Division. A more detailed procedural history of the case is set forth above. At the trial, several items of evidence were introduced which are relevant to Chase Revel's Petition for Certiorari. At the time of the trial of the case, Business Opportunities Digest, Straw's publication, enjoyed a subscription readership of 3,000 subscriptions (T. 27). He has several other publications which also contain business and investment advice. He publishes his own articles and editorializes his views on various business and investment opportunities in each of these publications. (T. 28)

Furthermore, testimony was elicited at trial from a Mr. Ron Gershon who is the President of the International Society of Financiers (T. 59). Mr. Gershon testified that Mr. Straw is very well known in the business community and is held in very high

esteem and is very well respected in the business community. (T. 59)

Mr. Straw himself testified on plaintiff's main case that he was angered and upset as a result of the publication of the editorial in Entrepreneur Magazine (T. 11, 16). However, he introduced no evidence as to Revel's underlying motivation or purpose for publishing the article.

After a jury verdict in favor of Mr. Straw, the matter was appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed that portion of the jury verdict awarding Straw compensatory damages and remanded that portion dealing with punitive damages to the trial court for further action. The matter is now before this Court on Revel's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court on succinct and uncomplicated facts to articulate the extent to which a media defendant may be held liable for editorially commenting upon the opinion of a media plaintiff.

The Court has struggled with the definition of and protection provided for limited purpose public figures in the cases of *Gertz vs. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974), *Wolston vs. Readers Digest Association, Inc.*, 443 U.S. 157, 166-168, 99 S.Ct. 2701, 2706-2707, 61 L.Ed. 2d 450 (1979), and *Time, Inc. vs. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed. 2d 154 (1976). In this case, a media plaintiff instituted this action seeking damages for an editorial comment by the media defendant, Chase Revel. However, Ron Smith, editor of Entrepreneur Magazine, clearly stated that the opinion that they published concerning Straw's publication, was one of editorial opinion (T. 117) and further, Straw had given his opinion of Revel's own publication initially and Revel was simply replying to that expression of opinion. This exchange of opinions regarding the quality of each other's publication is exactly what the First Amendment was designed to protect and foster. The trial court and the Eleventh Circuit, in affirming the trial court, erroneously found that actual malice was not required to be proved but rather

mere negligence was sufficient to allow recovery by a media plaintiff against a media defendant. This decision will certainly have a chilling effect on the free exchange of opinions by media parties. For this reason and others stated in this Application, a Writ of Certiorari to the Eleventh Circuit Court of Appeals should be granted.

ARGUMENT AND CITATION OF AUTHORITY

I.

THE MEDIA PLAINTIFF, J.F. STRAW, SHOULD HAVE BEEN CLASSIFIED AS A LIMITED PURPOSE PUBLIC FIGURE SO AS TO REQUIRE A CLEAR AND CONVINCING SHOWING OF ACTUAL MALICE IN ORDER TO RECOVER DAMAGES FROM A MEDIA DEFENDANT.

In *Gertz vs. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974),the Court refused to extend the principles first announced in *New York Times Company vs. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) and *Curtis Publishing Company vs. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967) to a situation involving a purely private figure who was claiming damages for an alleged defamation. However, in the process of refusing to extend the protections allowed to media defendants in cases where a private figure is seeking such damages, the Court created a new genre of public figure, to-wit: a limited purpose public figure. The Court noted that:

> In some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions. *Gertz,* 418 U.S. at 352, 94 S.Ct. 3013.

The principles set forth in *Gertz* have, since their anunciation, been subject to a process of fine tuning in the opinions of this Court and the Circuit Courts. As a result, several specific

elements of the *Gertz* definition of a limited purpose public figure have evolved.

At least two elements of the definition of a limited purpose public figure appear in the body of the *Gertz* opinion. First, the degree with which certain persons "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" is a factor to be considered in defining a limited purpose public figure. *See, Gertz vs. Welch,* 418 U.S. at 345, 94 S.Ct. at 3009. Second, the definition contained in *Gertz* also contemplates "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz,* 418 U.S. at 352, 94 S.Ct. at 3013. Third, there has been some discussion in subsequent opinions of this Court, which focuses on voluntary and purposeful conduct by the plaintiff so as to ascertain whether the plaintiff has sought to intentionally involve himself or herself in the controversy giving rise to the defamation. *Wolston vs. Readers Digest Association, Inc.,* 443 U.S. 157, 166-168, 99 S.Ct. 2701, 2706-2707, 61 L.Ed. 2d 450 (1979). Fourth, and finally, this Court has attempted to distinguish between essentially private controversies and controversies which have a public interest albeit a limited interest. *Times, Inc. vs. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed. 2d 154 (1976).

The best and most complete assimilation of the various factors which comprise the *Gertz* definition of a limited purpose public figure and which includes the subtle changes and additions made to that decision by subsequent decisions is contained in *Harris vs. Tomczack,* 94 F.R.D. 687 (E.D.Cal. 1982). In that case, Judge Karlton defined a limited purpose public figure as:

> A person who, by voluntary and intentional conduct, has vigorously sought to directly influence resolution of a particular controversy, identifiable as such from the *intended audience's* perception, resolution of which can reasonably be said to have a perceptible impact on persons other than the immediate participants in the controversy. For a person to be classified as a limited purpose public figure for these purposes, the alledged defamatory statement must be made within the scope of the particular controversy and must be reasonably related to that controversy. 94 F.R.D. at 703. (emphasis added).

Other than the Court's definitions of a limited purpose public figure as demonstrated in *Gertz, Wolston,* and *Firestone*, this definition by Judge Karlton provides a concise and all-encompassing definition of a limited purpose public figure. When the facts of the case at bar are considered, it is almost inconceivable that the plaintiff, J.F. Straw, could be classified as anything other than a limited purpose public figure for the purposes of this action. The trial Court and the Eleventh Circuit Court of Appeals failed to recognize and acknowledge the existence of several subtle aspects of this case which demand Mr. Straw's inclusion in the class known as limited purpose public figures. The failures on the part of the trial Court and the Court of Appeals to recognize Straw's proper classification contravenes the principles of law set forth by this Court in *Gertz, Wolston* and *Firestone* and requires remedial action by this Court pursuant to a Writ of Certiorari.

Upon examination of the facts of the case at bar, Straw undeniably satisfies each of the requirements for his inclusion in the class of limited purpose public figure. First, Straw thrust himself to the forefront of this particular controversy in order to influence the resolution of the issues involved. He did so when he published in Business Opportunies Digest, the following comment:

> Over the past month I have received a number of solicitations to participate in the multi level marketing program of the American Entrepreneur's Association. To those of you who sent me those solicitations and to any of you who may be considering entering that plan, THEY ARE IN BANKRUPTCY. In early April Chase Revel, the founder of American Entrepreneur's Association declared his company bankrupt and supposedly began firing those management people who he claimed were responsible.
>
> Whether Revel is personally responsible or not, the company is in bankruptcy proceedings. Therefore you're taking a substantial risk by dealing with them. A word to the wise is sufficient. (PL. Ex. 3)

As the petitioner stated in its brief to the Court of Appeals, Straw, not Chase Revel, Inc., landed the first blow in the war of words which gave rise to this libel action. It was in his editorial

first published in Business Opportunities Digest that Straw first editorialized his position as to the advisability of his readers investing in an organization known as the American Entrepreneur's Association, which was owned and operated by Chase Revel, Inc. Among other things, he stated that he had received several solicitations to invest in that organization himself and he was declining to do so and advised his readers to follow suit because the American Entrepreneur's Association was in bankruptcy. The issue of the advisability of investing in the American Entrepreneur's Association or Straw's standing to comment upon the financial status of that organization was the initial controversy which eventually gave rise to this action for libel. By virtue of his comment and editorial on the status of Chase Revel, Inc. and the American Entrepreneur's Association, Straw thrust himself to the forefront of a public controversy giving rise to this action and sought to influence the resolution of the issue of whether his readers should invest in one of Chase Revel, Inc.'s businesses. Straw's bold assertions in that editorial opened him up to just the type of criticism which he received in the article by which he claims he was libeled.

Second, the extent of Straw's participation in the controversy giving rise to this action was complete and thorough. Straw's participation in the controversy is best characterized as all-encompassing, especially in view of the fact that his comment in his own publication invited the response made by Chase Revel, Inc.

Third, it cannot be said that Straw was involuntarily drawn into the controversy. As editor of his own publication, Straw consciously elected to fire the first volley and thereby committed himself to an intentional involvement for the duration of the controversy.

Finally, the controversy at issue in this case is one of public concern as opposed to that contained in *Time, Inc. vs. Firestone, supra,* which involved an issue of purely private concern. *Also see, Dun and Bradstreet, Inc. vs. Greenmoss Builders, Inc.,* 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed. 2d 593 (1985). In the opinion of the Court of Appeals issued below, the Court, speaking through Judge Hill, noted that:

> The article defaming Straw purported to give investment advice to its readership, which is a matter of public concern. *Straw vs. Chase Revel, Inc.*, _____ F. 2d _____, (11th Cir. 1987) (Slip op. at 2125). (App, p. 20).

Although the statement by the Court of Appeals as to the public concern of the controversy was made in the context of whether Straw is entitled to punitive damages in this case, the statement by the Court of Appeals that the issue is one of public concern cannot be ignored. If the editorial opinion of Straw by Revel is a matter of public concern, why is not the advice of Straw about Chase Revel a matter of public concern also? Revel submits that Straw's statements concerning Revel in his own publication constitutes speech of public concern and should be so treated by this Court.

Straw can be a limited purpose public figure even though his readership at the time of the trial of the case was 3,000. The number of hearers in the audience is irrelevant. Indeed, this fact is one of the reasons Straw is a public figure for a *limited purpose*. Size of the applicable public is not dispositive. If size alone was the only determinative factor, many weekly newspapers in America would be deprived of the protection of the First Amendment. The extent to which Straw satisfies the relevant aspects of the status of limited purpose public figure which are described above is absolutely dispositive. Straw unquestionably has more than satisfied the requirements of public figure status and he should have been required to demonstrate with convincing clarity that the petitioner acted with actual malice in its publication of the allegedly libelous editorial as a predicate for any recovery.

In view of the above, Straw satisfies the component requirements of the definition of a limited purpose public figure set forth in *Gertz* and its progeny. The failure of the trial court and the Court of Appeals to recognize his status as a limited purpose public figure was error and ignores the obvious import of several decisions of this Court. That being the case, the petitioner suggests and contends that the Court should grant its Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals.

II.

A REVIEW OF THE ENTIRE RECORD OF THIS CASE DEMONSTRATES THAT THERE IS NO CONSTITUTIONALLY PERMISSIBLE BASIS FOR AN AWARD OF ANY TYPE IN FAVOR OF THE PLAINTIFF.

In *New York Times Company vs. Sullivan, supra,* the Court held that:

> We deem that considerations of effective judicial administration require us to review the evidence and the present record to determine whether it could constitutionally support a judgment for the respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated" 376 U.S. at 284-285, 84 S.Ct. 728.

Also see, Greenbelt Co-operative Publishing Association vs. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed. 2d 6 (1970); *Rosenbloom vs. Metro Media, Inc.,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed. 2d 296 (1971) and *Time, Incorporated vs. Pape,* 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed. 2d 45 (1971), in which the Court held that:

> Inquiries as to whether the Court of Appeals correctly applied the constitutional rule to the facts of a case are familiar under the settled principle that "in cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of the lower Courts but will re-examine the evidentiary basis on which those conclusions are founded;" (Citations omitted) and in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and State defamation laws on the other, we have frequently had occasion to review the evidence in the record to determine whether it could constitutionally support a judgment for the plaintiff.

In the case at bar, the petitioner suggests that this Court should conduct its own review of the record in this case after a grant of the petition presently before the Court so that it might correct the errors made by the District Court and perpetuated by the Court of Appeals. The award in favor of the plaintiff in this case contradicts the protection of the First and Fourteeth Amendments to the United States Constitution and contradicts the holdings of this Court in *Gertz, Wolston,* and *Firestone.*

The record in this case demonstrates the existence of at least two obstacles for the plaintiff, any one of which could force a finding in favor of the defendant.

First and foremost, the Court should note that the material which is alleged to be libelous was an opinion contained in an editorial published in space normally reserved for editorial items in Entrepreneur Magazine. The editor of the magazine at the time of the article's publication, testified at trial the the complained of material was intended to be and was in fact an editorial. (T. 117). By definition, an editorial is an article in a publication expressing the *opinion* of its editors or publishers. *American Heritage Dictionary,* 414 (Houghton Mifflin, 1969). The Court in *Gertz vs. Robert Welch, Inc., supra,* stated firmly that opinions are protected under the First Amendment:

> We begin with the common ground - under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend on its correction, not on the conscience of judges and juries, but on the competition of other ideas. 418 U.S. at 339-340, 94 S.Ct. at 3007.

The fact that the alleged libelous material is at worst a statement of opinion representing the views and beliefs of the editorial staff of Entrepreneur Magazine, leads to the conclusion that the material is protected under the First and Fourteenth Amendments to the Constitution of the United States. Straw therefore, should not have been allowed a recovery of any damages whatsoever at trial and any act on the part of the Eleventh Circuit Court of Appeals which upholds that award, was made in error.

Next, for the reasons set forth above, Straw fits neatly into the class of limited purpose public figures. As such, he should have been required to demonstrate with convincing clarity that your petitioner acted with actual malice in the publication of the allegedly libelous material. As this Court is aware, the definition of actual malice is stated in *New York Times Company vs. Sullivan, supra.* The petitioner suggests and contends that even a close examination of the transcript of the trial of the case and the remainder of the record would fail to reveal any evidence of actual malice on the part of the petitioner in publishing the complained of material. Although Straw testified that he had been hurt and felt like Chase Revel, Inc. was out to get him (a conclusion that had no factual basis which was proved at trial), this testimony was refuted by that of Ronald J. Smith, the editor of Entrepreneur Magazine at the time of the publication. Beginning at Page 113 of the transcript of the trial of the case, Mr. Smith upon questioning by counsel for the petitioner, made a line by line examination of the article in question. Mr. Smith's testimony in brief was that the substance of the editorial was either the opinion of the editorial staff at Entrepreneur Magazine, verifiable fact, or fair comment on matters of public concern. In response to cross-examination by counsel for Straw, Mr. Smith testified that it was not his purpose to attack Straw personally (T. 119). Further, at Page 121 of the transcript, Mr. Smith detailed the extent to which he investigated the content of the complained of material, stating that he was either personally aware of the factual basis of the material or that there was no need to investigate the truth or veracity of the opinion of the editorial staff of Entrepreneur Magazine simply because it was an editorial opinion. See *Gertz vs. Robert Welch, Inc., supra.* There is no independent evidence or testimony by any party that the editorial staff of Entrepreneur Magazine or Chase Revel, Inc. had any ill will against Straw or were delinquent in such a manner as to satisfy the standards set forth in *New York Times vs. Sullivan, supra,* so as to authorize an award of damages of any type in favor of Mr. Straw. The absence of any evidence of actual malice as that term has been defined in the decisions of this Court acts to vitiate any award in favor of the plaintiff. Therefore, the petitioner's Writ of Certiorari should be granted, so that this Court may correct the initial errors committed by the trial Court and perpetuated by the Court of Appeals in allowing an award of any character in favor of the plaintiff to remain in effect.

CONCLUSION

WHEREFORE, in view of the fact that Mr. Straw has been classified as a private figure by the trial Court and the Court of Appeals, which classification violates the plain import of the decisions of this Court beginning with *Gertz vs. Robert Welch, Inc.* and its progeny, the Court should grant Chase Revel, Inc.'s Petition for a Writ of Certiorari. Furthermore, when, after a de novo review of the entire record of the case, it becomes apparent that Straw is a public figure for the purpose of this action and that there is no evidence of any actual malice on the part of your petitioner in publishing the article complained of, the Court should direct entry of a judgment in favor of the defendant.

Respectfully submitted this 27th day of July, 1987.

Barnes, Browning, Tanksley,
and Castrella

By: _____
Roy E. Barnes

By: _____
Jerry A. Landers, Jr.

Attorneys for Petitioner

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for the Respondents with two copies of the foregoing Petition for Certiorari by depositing said copies in the United States Mail with adequate postage affixed thereon, to:

James M. Barnes, Esq.
P.O. Box 611
Dalton, Georgia 30720

Mrs. Adele Platt Grubbs
P.O. Box 1149
Marietta, Georgia 30061

This 27th day of July, 1987.

ROY E. BARNES

APPENDIX
STRAW V. CHASE REVEL, INC.

J.F. STRAW, d/b/a Business Opportunities Digest, Plaintiff-Appellee,

v.

CHASE REVEL, INC. d/b/a Entrepreneur Magazine, Defendant-Appellant.

No. 86-8524.

United States Court of Appeals,
Eleventh Circuit

March 27, 1987.

Appeal from the United States District Court for the Northern District of Georgia.

Before HILL and HATCHETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

HILL, Circuit Judge:

Appellee J.F. Straw publishes a magazine known as the Business Opportunities Digest. The publication serves as a clearing house to put people interested in potential investment opportunities in touch with one another. The magazine also contains small commentaries written by Straw. One such commentary, which appeared in the August 1982 issue, warned that a rival enterprise, American Entrepreneur Association, ("AEA") was in bankruptcy.[1]

1. The editorial, in its entirety read:

Over the past month I have received a number of solicitations to participate in the multi-level marketing program of the American Entrepreneurs' Association. To those of you who sent me those solicitations and to any of you who may be considering entering that plan, they are in bankruptcy. In early April, Chase Revel, the founder of American Entrepreneurs' Association, declared his company bankrupt and supposedly began firing those management people who he claimed were responsible.

Whether Revel is personally responsible or not, the company is in bankruptcy proceedings. Therefore, you're taking a substantial risk by dealing with them. A word to the wise is sufficient.

AEA, founded by appellant Chase Revel, also published a magazine containing business opportunities. After Straw's comment appeared, appellant Chase Revel published an editorial in his own magazine, *Entrepreneur Magazine*, which read:

Caveat Emptor

> When we started *Entrepreneur Magazine* about 10 years ago, practically nothing existed in our field. Now there are hundreds of publications. However, most offer very little help to anyone. The majority don't have any value and go out of business very quickly. A few steal our material, but our attorneys stop them.
>
> However, one has somehow survived even though it offers the least of any business publication. It's called *Business Opportunities Digest* and is published in some town in Tennessee by a man of unknown credentials: Mr. J.F. Straw.
>
> It appears he subscribes to various city newspapers and extracts his 'opportunities' from their classified sections or accepts payment from people to editorialize their business opportunities. Either way, you will be much further ahead to read the classified business opportunities in your newspaper yourself. Especially for the price difference, Straw charges $36 for 12 four-page issues. Buyer beware.

After being notified about the article, Mr. Straw contacted Ron Smith, the editor under whose name the editorial appeared. He requested a retraction. When this was not forthcoming he brought suit. The case was removed to federal court, and originally dismissed for lack of jurisdiction over the defendants. The district court eventually reconsidered its motion to dismiss and ultimately granted only the motion of defendant Ron Smith to dismiss for lack of personal jurisdiction. The court determined that the magazine itself had sufficient minimum contacts with the the State of Georgia to allow it to be sued there. The case then went to trial, where the jury awarded Mr. Straw $25,000 in compensatory damages and $100,000 in punitive damages.

I. PERSONAL JURISDICTION

[1] On appeal Chase Revel reasserts his jurisdictional challenge. When the district court originally dismissed the case for lack of jurisdiction, it did not have at its disposal facts about the defedant magazine which it ultimately found met the standard of minimum contacts under *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed. 2d 804 (1984). Appellant does not offer anything on appeal which disputes the district court's final factual findings. The court found that *Entrepreneur Magazine* had made deliberate purposeful attempts to establish business contacts in Georgia; received advertising revenues from companies within the state; and had a not insignificant percentage of its circulation directed at Georgia. Given these facts, Revel had sufficient contacts with Georgia to support the district court's exercise of personal jurisdiction.

II. SUFFICIENCY OF THE EVIDENCE

Revel next asserts that the jury's verdict was not supported by the evidence. First, he argues that Mr. Straw never showed that the magazine or its editor was negligent in publishing the offensive editorial. Appellant claims that Mr. Straw's testimony as "replete with reference to the fact that the article was published . . . [but] there was absolutely no evidence which would tend to demonstrate the standard of care applicable to the facts of this case." He does not cite to the record nor to any case law in support of this proposition.

[2] The testimony given at trial was sufficient to demonstrate that the appellant was at least negligent. Mr. Ron Gershen, who also publishes a financial information newsletter, testified that he always checks out the sources of financial ads appearing in his newsletter. Testimony by Ron Smith, the editor over whose name the article appeared, indicated that he failed to verify any of the contents of the article disparaging Mr. Straw. Instead, Mr. Smith maintained that the article was handed to him in completed form by Revel, and that the piece was an editorial opinion, not subject to factual verification. This argument is not persuasive; the editorial reads like a recitation of fact, not a pure opinion. The jury was

entitled to find that Mr. Smith's failure to verify the assertions contained in it amounted to a failure to exercise that degree of care excercised under the same or similar circumstances by ordinarily prudent persons, and that this negligence was imputable to Mr. Revel. *See* O.C.G.A. 51-1-2 (1982).

Appellant also contends that Straw never showed that the statements in the article were false. This assertion is similarly unelaborated by explanation, citations to the record, or citations to applicable authority, except to reference 28 pages of testimony by Ron Smith. He also claims that Mr. Straw did not demonstrate any evidence of damages, only that he was "mad and upset." Appellant alleges that evidence at trial demonstrated that the circulation of Straw's magazine has increased 400 percent since the alleged libel, proving that he was not damaged.

[3] An examination of the record shows that Mr. Straw denied ever having stolen any articles or information from *Entrepreneur Magazine*. He also denied the accusation that he culls his information from the classified ads in other newspapers. Moreover, he denied that people pay him to editorialize their business opportunities. This testimony contradicts those things reported as facts in the challenged editorial. The jury could therefore conclude that the article was false and defamatory.

[4] Under Georgia law the measure for compensatory damages in an action for defamation is left to the enlightened conscience of the jury. *Franklin v. Evans*, 55 Ga. App. 177, 189 S.E. 722 (1937); *Williamson v. Lucas*, 171 Ga. App. 695, 320 S.E. 2d 800 (1984). The relatively slow-paced growth of Mr. Straw's company, coupled with Mr. Straw's own testimony that he suffered ridicule from some of his colleagues, adequately shows that his reputation was damaged.

A new trial may not be granted unless the trial judge concludes that the jury's verdict is against the great weight of the evidence. *J & H Auto Trim Co. v. Bellefonte Insurance Co.*, 677 F2d 1365, 1368 (11th Cir. 1982). After studying the record we find no reason to overturn the court's decision to deny a new trial. On all of the above issues, the evidence sufficiently supported the jury's verdict.

III. PRIVILEGE

[5] Next appellant alleges that the editorial by Mr. Smith was

privileged under Georgia law, and not subject to a defamation suit. He cites no case law in support of this proposition. The specific areas in which such a privilege operates are enumerated in O.C.G.A. 51-5-7.[2] None of these enumerated circumstances are even remotely applicable, and the district court properly refused the instruction.

IV. PRIVATE OR PUBLIC FIGURE

Under *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), a public figure cannot prevail in an action for media libel unless he can prove actual malice. A private figure can obtain compensatory damages absent a showing of actual malice. *Gertz v. Robert Welch*, 418 U.S. 323, 347, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789 (1974).[3] Here appellant asserts that Mr. Straw was a public figure and that he did not make the requisite showing of actual malice.

In the *Gertz* case the Supreme Court said:

> [A person's] designation [as a public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

2. O.C.G.A. 51-5-7 states:

> The following communications are deemed privileged:
> (1) Statements made in good faith in the performance of a public duty;
> (2) Statements made in good faith in the performance of a legal or moral private duty;
> (3) Statements made with a good faith intent on the part of the speaker or to protect his interest in a matter which it is concerned;
> (4) Fair and honest reports of the proceedings of legislative or judicial bodies.
> (5) Fair and honest reports of court proceedings;
> (6) Comments of counsel fairly made on the circumstance of a case in which he is involved and on the conduct of the parties in connection therewith;
> (7) Truthful reports of information received from any arresting officer or police authority;
> (8) Comments upon the acts of public men in their public capacity and with reference thereto.

3. The term "actual malice" will be defined and dealt with further in the next portion of this opinion.

Id., 418 at 351, 94 S.Ct. at 3012. The Court went on to hold that although the particular individual in that case was "well known in some circles, he had achieved no general fame or notoriety in the community." Nor did he "thrust himself into the vortex" of a particular public controversy.

He was therefore a private figure. *Id.*, 418 U.S. at 352, 94 S.Ct. at 3013.

Appellant concedes that Mr. Straw does not have any general notoriety.[4] However, he asserts that Mr. Straw is a "public figure" in the business community by virtue of being the publisher of a business newsletter.

[6] We conclude that Mr. Straw is much more like a petitioner in *Gertz*. He is well known in some circles, and publishes in a particular field; but not every publisher is automatically a public figure by virtue of his access to a printing press. At the time that the offensive editorial appeared, Mr. Straw's magazine had a limited circulation of 750 among a small sector of the business community. This does not make him a public figure in the general sense. Nor can it be said that Mr. Straw injected himself into a public controversy by truthfully reporting that AEA had filed for bankruptcy.[5] The district court did not err in concluding that Mr. Straw was a private figure, and instructing the jury that he could recover compensatory damages for any harm caused by the negligent publication of statements found to be defamatory. Thus, the jury's award of $25,000 in compensatory damages must stand.

4. At oral argument counsel for appellant conceded that Mr. Straw was a private figure, asserted that recent Supreme Court precedent indicated that the speech "on a matter of public concern" automatically became entitled to *New York Times* protection, citing *Philadelphia Newspapers, Inc. v. Hepps*, ___ U.S. ___, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). We find that counsel's argument is based on a misreading of that case. In fact, the Court's opinion reaffirms the notion that a private figure need not meet the stringent requirements of *New York Times* in order to obtain compensatory damages, even where the defendant's allegedly defamatory speech *is* "of public concern." *Philadelphia Newspapers*, 106 S.Ct. at 1563. The "public concern" issue does not enter the public/private figure equation. A private figure need show actual malice only to obtain a punitive damage award, as discussed *infra*.

5. At trial and at oral argument, counsel for the appellant attempted to demonstrate that Straw's editorial was false because AEA was in a Chapter 11 reorganization and not a "straight" bankruptcy. The district court found no merit in this distinction and neither do we. To say that a party involved in a Chapter 11 proceeding is in bankruptcy is not a false statement. Therefore Straw's article did not invite the type of retaliatory response made by Revel and Smith, and certainly did not thrust Mr. Straw into a public controversy.

V. PUNITIVE DAMAGES

Finally, appellant contends that the judge's instructions regarding punitive damages were erroneous. He claims that the court failed to explain the connection between actual malice and punitive damages, and that this violated the punitive damage rule set down by the Supreme Court in *Gertz*.

[7] In addition to promulgating the public/private figure distinction, in *Gertz* the Supreme court held that punitive or presumed damages may not be awarded in a defamation case unless the plaintiff can show that the defendant acted with actual malice. Actual malice is defined to mean that the defendant either knew the allegedly defamatory material was false, or published it with a reckless disregard of whether it was false or not. *Gertz*, 418 U.S. at 349, 94 S.Ct. at 3011. In other words, although a private figure can recover compensatory damages upon a showing of simple fault or negligence,[6] to recover punitive damages the aggrieved party must meet the *New York Times* standard of actual malice.

[8] In *Philadephia Newspapers v. Hepps*, ____ U.S. ____, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), the Supreme Court explained (in dicta) that these constitutional restrictions on state defamation law are justified only where a defamation action is brought against a "media defendant," speaking on an issue of "public concern," in order to protect such defendants from the chilling effect that state libel law could have on their first amendment rights. *Id.*, 106 S.Ct. at 1562, 1563 & n. 4. It is clear that *Entrepreneur Magazine* qualifies as a media defendant; according to the testimony of Ron Smith, the magazine has a monthly circulation of over 200,000 and is distributed in 16 foreign countries. The article defaming Straw purported to give investment advice to its readership, which is a matter of public concern. Thus, the appellant falls within the protection afforded by *Gertz*, and Straw must show actual malice to obtain punitive damages.

6. In *Philadelphia Newspapers*, the Supreme Court held that the burden of showing falsity in a defamation action against a media defendant must always lie with the plaintiff. *Id.* 106 S.Ct. at 1563. The problem does not arise here because Georgia law puts the burden of proving falsity on the plaintiff. *Medlin v. Carpenter*, 174 Ga.App. 50, 54, 329 S.E.2d 159 (1985). Only the element of malice may be inferred under O.C.G.A. 51-5-5.

Straw's burden is not lessened by the plurality opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builder's Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). There a building contractor sued Dun & Bradstreet for issuing an allegedly false credit report to the contractor's creditors. Because the case involved a private figure plaintiff and speech of "private concern," *i.e*, a private matter, published by a non-media defendant, a plurality of the court held that punitive damages may be awarded absent a showing of actual malice. *Id.*, 105 S.Ct. at 2946. In *Philadephia Newspapers*, a majority of the court cited this plurality position with apparent approval. *Id.*, 106 S.Ct. at 1563. However, Straw's case is clearly distinguishable from *Dun*, in that Straw sued a media defendant, and the allegedly defamatory speech involved an area of public concern. This brings his case within the *Gertz* standard.

[9] While the above discussion may seem clear-cut, confusion often enters the defamation arena because the word "malice" has two distinct meanings. In order to prevail in a suit for libel, Georgia law requires that the plaintiff show the statement was false *and* "malicious." O.C.G.A. 51-5-5. In this context "malice" means ill will, and "malicious" denotes statements deliberately calculated to injure. Georgia courts refer to this as "common law malice," and distinguish it from actual or "constitutional" malice. *See Williams v. Trust Co. of Georgia*, 140 Ga.App. 49, 56, 230 S.E.2d 45 (1976). As noted above, the latter terms deals only with the speaker's knowledge of the truth or falsity of the allegedly defamatory statements. To give the jury a choice between common law malice and actual malice where the constitution requires that actual malice be shown is reversible error. *Greenbelt Cooperative Publishing Assoc. Inc. v. Bresler*, 398 U.S. 6, 10, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).

Here the district judge apparently gave the jury a choice between common law or actual malice in finding that the defamatory statements were "malicious." First, the court correctly defined libel as:

> [A] false and malicious defamation of a person by printing or writing intending to provoke him to wrath or expose him to public hatred, contempt or ridicule or deprive him of the benefits of public confidence and social intercourse.

The court then gave instructions describing the ways in which malice may be proven. First, in language taken verbatim from O.C.G.A. 51-5-5, the court stated:

> Now, in all actions for printed or spoken defamation, malice is inferred from the character of the charge. However, the existence of malice may be rebutted by proof. In all cases, such proof shall be considered in mitigation of damages.

The court then instructed the jury:

> As to proof of malice, proof that the writing is false, and that it maligns the private character and professional standing of another is, itself, evidence of legal malice.
>
> A publication is made with actual malice as that term is used in this charge if it is made with knowledge that it is false or with the reckless disregard of whether it was false or not.

These instructions did correctly state the law, and they did contain the terms "legal" and "actual" malice. Further, in the context of the instruction, "legal" malice probably means common law malice. However, the instructions did not explain the meaning of "legal malice." Nor did the charges explain the difference between actual malice and common law malice. Moreover, the court never explained the importance of actual malice in a defamation suit. Thus, a reading of the instructions in their entirety indicates that the jury could have found that Revel acted with common law malice *or* actual malice in publishing disparaging comments about Mr. Straw. The jurors could have either inferred malice, under the first part of the instructions, or have found actual malice according to the second part of the charge.

[10] In another context, there would have not been any error in the charge; common law malice can be inferred, and in some circumstances it is not necessary for a private figure plaintiff to prove actual malice. The problem here is that the court never charged the jury that *only* a finding of *actual* malice would support an award of *punitive* damages in a libel action against a media defendant. Instead, the court gave a standard punitive damages charge, informing the jury:

> Punitive damages, that is aggravated damages, may be

authorized when the circumstances of the wrong are such as to show an entire want of care and indifference to the consequences.

[11] While this comes close, it does not sufficiently relate a finding of actual malice to punitive damages. Reckless disregard for the truth of a statement is not the same as reckless disregard for the consequence of one's actions. Thus the instructions authorizing the punitive damage award fall short of what is required by *Gertz* and *Greenbelt*.[7]

To conclude, common law malice and negligence will support the compensatory damage award.[8] Only actual malice will support an award of punitive damages. Here it is unclear whether the jury based its punitive award on a finding of common law malice or actual malice. Thus we must reverse and remand the case for a new trial, for a redetermination of the actual malice issue and the appropriate amount, if any, of punitive damages. The compensatory award is affirmed.[9]

AFFIRMED in part and REMANDED in part, with instructions.

7. Contrary to appellant's assertion, we need not hold O.C.G.A. 51-5-5 unconstitutional because it allows "malice" to be "inferred from the character of the charge." That provision clearly relates to O.C.G.A. 51-5-1, which requires that a statement be "false and malicious" in order to constitute libel. This means malice in the common law sense, not actual malice. *See Williams,* 140 Ga.App. at 56, 230 S.E.2d 45. The constitutional issue only arises in cases against a media defendant involving either a public figure plaintiff, or a private plaintiff seeking punitive damages, because then actual malice must be proven. Actual malice may not be presumed. *New York Times,* 376 U.S. at 284, 84 S.Ct. at 728. In such cases, the potential constitutional pitfalls posed by 51-5-5 may be avoided by the trial judge, who need only explain what common law malice means under 51-5-5, and carefully distinguish it from actual malice.

8. It does seem incongruous common law to state that a defamation action may be based on common law malice and negligence. "Malicious," meaning full of malice, connotes an act of intentional hostility which seems to contradict the possibility of negligence. To avoid confusion, one must remember that malice and negligence support different essential elements of the tort. A statement may be brutally malicious but will not support an action for defamation unless it is also false. Negligence measures only the defendant's degree of care in verifying the truthfulness of the statement.

9. At oral argument counsel for appellant recognized that the two damage awards were separable. He stated:

> [T]he most troubling part, legally, of this case is the punitive or presumed damages, and I will admit to the court, there may be a determination and a distinction where the compensatory damages can stand.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86-8524

J.F. STRAW,
d/b/a BUSINESS OPPORTUNITIES DIGEST, Plaintiff-Appellee,

versus

CHASE REVEL, INC.,
d/b/a ENTREPRENEUR MAGAZINE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 27 , 11 Cir., 1987, _____ F.2d _____).
(May 8, 1987)

Before HILL and HATCHETT, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll of the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ JAMES C. HILL
United States Circuit Judge

REHG-6
(Rev. 6/82)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

J.F. STRAW d/b/a
BUSINESS OPPORTUNITIES
DIGEST

CIVIL ACTION

v.

NUMBER C83-554R

CHASE REVEL, INC.
d/b/a ENTREPRENEUR
MAGAZINE

ORDER

Upon the trial of this diversity case on plaintiff's claim in libel the jury returned a verdict in favor of the plaintiff and against the defendant for $25,000.00 compensatory damages and $100,000.00 in punitive damages.

Plaintiff published a newsletter with an annual circulation of some 3,000 copies. In August, 1982, plaintiff published a short article stating that Chase Revel, Inc., was in bankruptcy. At trial this fact was undisputed. Shortly after the publication of this article by plaintiff, the defendant, Chase Revel, Inc., d/b/a Entrepreneur Magazine, published an article on its editorial page which plaintiff contended was libelous. The editorial or article published by the defendant stated that the plaintiff stole material from the defendant magazine and prepared his publication by subscribing to newspapers and then extracting his opportunities from the classified sections thereof or by accepting payment from people to editorialize their business opportunities.

The plaintiff contended that the article at issue was published soley in retaliation to the plaintiff's truthful article. The evidence at trial showed that the Chase Revel, Inc. article was prepared by Chase Revel and submitted to editor Ron Smith for publication. Ron Smith testified he made no investigation of any kind as to the veracity of the article's content. Chase Revel did not testify at trial. Plaintiff offered evidence that the content of the article was untrue.

The case is now before the Court upon defendant's motion for a remittitur, or in the alternative for a new trial and its motion for judgment in accordance with its motion for a directed verdict (motion for judgment notwithstanding the verdict) or, in the alternative for a new trial. In its motion for a remittitur defendant contends that the award of punitive damages in the amount of $100,000.00 should be ordered by the Court to be remitted, in that there is no evidence to support an award of punitive damages and the criteria used by the Court in submitting the issue of punitive damages to the jury was in error.

The Court has carefully considered the motions, the briefs in support thereof together with the plaintiff's response. The Court has also given consideration to the facts presented to the jury and concludes that defendant's various motions are without merit.

ACCORDINGLY, defendant's motion for a remittitur, or in the alternative for a new trial and defendant's motion for judgment in accordance with its motion for a directed verdict, (motion for judgment notwithstanding the verdict) or, in the alternative for a new trial, are each overruled and denied by the Court.

IT IS SO ORDERED, this the 23 day of June, 1986.

/s/ HAROLD L. MURPHY
United States District Judge

Civ 31
Rev 7/82

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT: NORTHERN DISTRICT OF GEORGIA
CASE TITLE: J. F. STRAW d/b/a BUSINESS OPPORTUNITIES DIGEST v. CHASE REVEL, INC. d/b/a ENTREPRENEUR MAGAZINE	DOCKET NUMBER: C83-554R NAME OF JUDGE OR MAGISTRATE: HAROLD L. MURPHY

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Plaintiff, J. F. Straw d/b/a Business Opportunities Digest, recover of the Defendant, Chase Revel, Inc. d/b/a Entrepreneur Magazine, the sum of ONE HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS ($125,000.00), with interest at the rate as provided by law, and his costs of action.

FILED IN CLERK'S OFFICE
U.S.D.C. - Rome

APR 1 1986

LUTHER D. THOMAS, Clerk
By T. Stanch
Deputy Clerk

CLERK		DATE
LUTHER D. THOMAS		April 1, 1986
(BY) DEPUTY CLERK: T. Stanch		

87-322 (2)

Supreme Court, U.S.
FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

Case Number _____

IN THE

Supreme Court of the United States

October, 1987 Term

CHASE REVEL, INC., d/b/a ENTREPRENEUR MAGAZINE
Petitioner,

vs.

J.F. STRAW, d/b/a BUSINESS OPPORTUNITIES DIGEST
Respondent.

BRIEF IN OPPOSITION TO PETITIONERS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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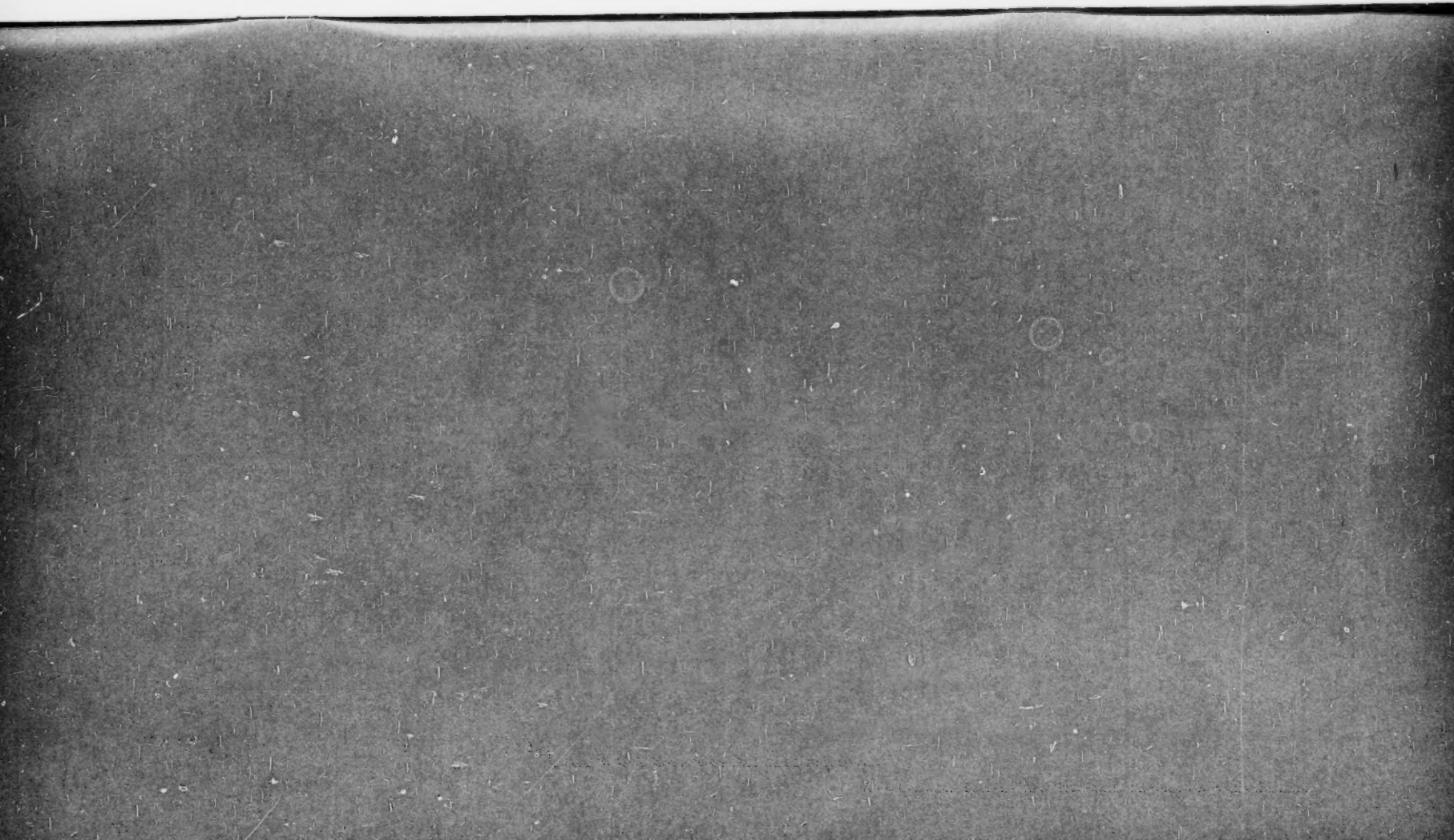

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TABLE OF CONTENTS

Table of Contents....2

Table of Authorities....3

Opinions of the Court Below....4

Statement of Jurisdiction....5

Questions Presented for Review....6

Statutes Involved....7

Statement of the Case....8

Reasons for Denying the Writ of Certiorari

A) Summary....10

B) Argument and Citation of Authority....11

The Verdict is Constitutionally Sound....13

Conclusion....15

Certificate of Service....16

TABLE OF AUTHORITIES

I. CASES

Gertz v. Robert Welch, Inc. 10, 11
418 U.S. 322

Loeb vs. Glove Newspapers Co. 11, 13
489 F. Supp. 481

Melton v. Bow 13
241 Ga. 629, 247 SE 2d 100

New York Times Co. v. Sullivan 14
376 U.S. 254

OPINIONS OF THE COURT BELOW

The opinion below is as set out at Pages 20 et seq. of the Petitioners

Petition - J. F. Straw, d/b/a Business Opportunities Digest vs. Chase Revel, Inc. d/b/a Entrepreneur Magazine_____ F.2d 6th_____ (11th Circuit 1987) (Slip Op. P. 2119) (Number 86-85 24)

STATEMENT OF JURISDICTION

Respondent agrees that this Court has jurisdiction of this matter for the reasons set out in Petitioners Statement of Jurisdiction.

QUESTIONS PRESENTED FOR REVIEW

1.

J.F. Straw was at all time material herein a private figure as defined by the applicable libel laws.

The fact that J.F. Straw, the publisher of a limited circulation newsletter of 250 copies per month among a small sector of the community, published a truthful article that Petitioner was in Bankruptcy does not make him a public figure.

2.

The verdict for $25,000.00 compensatory damages for libel is constitutionally sound.

STATUTES INVOLVED

1.

Official Code of Georgia Annotated Section 51-5-1 which states:

"a) A libel is a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule."

2.

Official Code of Georgia Annotated Section 51-5-2 which states:

"a) Any false and malicious defamation of another in any newspaper, magazine, or periodical, tending to injure the reputation of the person and expose him to public hatred, contempt, or ridicule, shall constitute a newspaper libel."

3.

Official Code of Georgia Annotated Section 51-5-5 which states:

"In all actions for printed or spoken defamation, malice is inferred from the character of the charge. However, the existence of malice may be rebutted by proof. In all cases, such proof shall be considered in mitigation of damages. In cases of privileged communications, such proof shall bar a recovery."

STATEMENT OF THE CASE

Respondent respectfully submits that he agrees with Part 1 of Petitioners "Statement of the Case and Basis for Original Federal Jurisdiction."

However, Respondent shows that Part II - being the actual Statement of the Case is inaccurate and editorial in content. Therefore Respondent must submit his Statement of the Case as follows:

The Respondent published a newsletter with an annual circulation of some 3000. (T-14) In August 1982, Respondent published a short article stating that Petitioner Chase Revel, Inc. was in bankruptcy (T13, Plaintiff Ex.3). At trial, the fact that this article was true and that Chase Revel, Inc. was in bankruptcy was undisputed (T112).

The Petitioner publishes a magazine over the newstand and by subscription with an annual circulation of 1.2 million.

In retaliation for this truthful article, Petitioner printed the following article:

"CAVEAT EMPTOR"

When we started Entrepreneur Magazine about 10 years ago, practically nothing existed in our field. Now there are hundreds of publications. However, most offer very little help to anyone. The majority don't have any value and go out of business very quickly. A few steal our material but our attorneys stop them.

However, one has somehow survived even though it offers the least of any business publication. It is called Business Opportunities Digest and is published in some town in Tennessee by a man of unknown credentials: Mr. J. F. Straw.

It appears he subscribes to various city newspapers and extracts his "opportunities" from their classified sections or

accepts payment from people to editorialize their business opportunities. Either way, you would be much further ahead to read the classified business opportunities in your newspaper yourself. Especially for the price difference. Straw charges $36.00 for twelve 4 page issues. Buyer beware." (Plaintiff's Exhibit 1)

This factual article states that Respondent stole material from the Petitioner's magazine and prepared his publication by subscribing to newspapers and then extracting his opportunities from the classified sections thereof or by accepting payment from people to editorialize their business opportunities. These statements were false and defamatory.

The Petitioners article was prepared by Chase Revel and submitted to editor Ron Smith for publication. Ron Smith testified that he made no investigation of any kind as to the accuracy fo the articles content. (T120-121). Chase Revel did not testify at trial.

Respondent requested a retraction of the article, (Plaintiff's Exhibit 2) and Respondents witness Ron Gershen stated he requested an explanation of the charges in writing and by telephone (T-57). None of these were responded to (T-57).

The jury returned a verdict for the Respondent and against the Petitioner in the sum of $25,000.00. The punitive damages were reversed by the Eleventh Circuit Court of Appeals based on the charge and that issue has been remanded back to the Trial Court for further determination.

REASONS FOR DENYING THE WRIT OF CERTIORARI

A) SUMMARY:

It is respectfully submitted that the Petitioner has failed to comply with Rule 17.1 of this Court and failed to show any of the reasons set out therein as grounds for the granting of this Petition for the Writ. There are no conflicting decisions, there is no federal question which needs to be decided and no departure by the trial court or 11th Circuit from normal judicial proceedings. In fact this case contains no new or far reaching issues whatsoever.

In Gertz vs. Robert Welch, Inc. 418 U.S., 323 an attorney who published books and was acting in his capacity as an attorney in regard to the libel raised was held to be a private figure. Therefore it is clear that J.F. Straw, who published a 4 page newsletter with 3000 annual circulation and who published the fact that Petitioner was in bankruptcy is certainly a private figure.

This case is not one regarding an exchange of opinions.

The Respondent in his 4 page newsletter stated, as fact, that Petitioner was in bankruptcy. This fact is true and undisputed.

In retaliation thereto, Petitioner published in its national glossy magazine with 1.2 million circulation, the article involved in this suit (Plaintiff's Exhibit 1). It contains factual statements that Respondent stole material as well as other defamatory and libelous. There was no defense raised by Petitioner that the article was true.

This case is a libel case with no special features, the jury verdict and decision of the 11th Circuit are correct and there is no reason factually or legally for the Petition for Certiorari to be granted.

B. ARGUMENT AND CITATION OF AUTHORITY

i) PRIVATE FIGURE / PUBLIC FIGURE

The Respondent is clearly a private figure and may recover against the Petitioner for libel without showing actual malice.

In Gertz vs. Robert Welch, Inc. 418 U.S. 322, this court said it would not lightly assume that a person was a public figure. In that case, the person libeled was an attorney, he was an officer in organizations, he published books and he was acting in his capacity as an attorney in regard to the libel raised. It was held that he was not a public figure.

In Gertz vs. Welch supra it was held that in order for that attorney to be a public figure, he must have had general fame or notoriety throughout the community, even if that general fame or notoriety involved a limited range of issues.

The Respondent herein has no such general fame or notoriety — he is known in the sphere of publishing small newsletters — but he has no general fame or notoriety.

The alternate method of becoming a public figure as set out in Gertz v. Welch Supra is to inject yourself or be drawn into a particular public controversy.

In Loeb v. Globe Newspapers Co. 489 F. Supp 481, it was held that a publisher who regularly takes a strong public stand on controversial issues invites an expression of contrary opinion. It also held that those who thrust themselves into the forefront of a particular public controversy in order to influence resolution of the issues involved, invites attention from it. In that case there was a series of articles in regard to a Presidential Election.

In the present case, there are no such facts. The Respondent herein publishes a small newsletter in which he truthfully

stated that the Petitioner was in bankruptcy. The fact that the Petitioner was in bankruptcy had been published by various newspapers, including the Wall Street Journal — (Plaintiff's Exhibit 6).

This case does not involve a controversy. The article of the Respondent was not an attempt to influence opinion, ideas or strong public issues, nor did it invite response. Respondent could not have anticipated that by stating Petitioner was in bankruptcy, he would become a personal target of a blistering false character assasination by the Petitioner.

At the Trial Court level, the Petitioner claimed that the defamatory article was merely a reply to Respondent's article. Now he says it was an exchange of opinions. Neither of these postures is correct. The Defamatory article was designed to hurt and destroy the Respondent, was published without any verification of its contents and it did damage the Respondent.

The Respondent is clearly a private figure.

The 11th Circuit Court of Appeals is clearly correct in Paragraph IV of its opinion and a Writ of Certiorari should not be granted.

i. THE VERDICT IS CONSTITUTIONALLY SOUND

In this section of his argument, the Petitioner raises two issues — Opinion and Private Figure.

Clearly the defamatory article is not one of opinion — this fact was determined by the jury and should not be disturbed on appeal.

The article involved stated that the Respondent had stolen material from both the Petitioner and other persons. (Plaintiff's Exhibit 1).

"To impute the crime of theft to a person is actionable per se without proof of special damages" Melton v. Bow 241 Ga. 629, 247 SE 2d 100.

The Respondent presented evidence that the article was false. He denied that he had ever stolen any articles from the Defendant or any other magazine or that people paid him to editorialize their business opportunities. (T-30) There are other errors complained of in the article, but those three stated above are more than sufficient to result in the judgment obtained in this matter. To accuse someone of theft is not an opinion.

It is also to be noted that the protection provided by a statement of opinion applies only to public figures — Loeb vs. Globe Newspaper Company 489 F 2nd 481. Here the Respondent is a private figure.

In the second portion of this heading, the Petitioner again argues private figure / public figure, this has been addressed above and Respondent has clearly been shown to be a private figure.

Proof of actual malice need not be made but Respondent can recover absent showing of actual malice.

It is however to be noted that the jury did find $100,000. punitive damages which issue has been remanded back to the Trial Court for further trial.

The evidence presented does in fact support the actual malice standards of New York Times Co. v. Sullivan 376 U.S. 254 of actual malice or reckless disregard.

Here the Petitioner was clearly angry that the news had got out that it was in Bankruptcy. Although the Wall Street Journal issued the same statement, it would be too big to take on. So Petitioner viciously attacked a little tiny publisher in a clear attempt to destroy the Respondent. Chase Revel brought in the article and without any verification, the editor published it. Actual malice was shown.

However the Respondent is a private figure and to recover for compensatory damages no actual malice need be shown.

CONCLUSION

Clearly there is no ground or reason shown for the grant of the Writ of Certiorari. There are no conflicting decisions or federal questions. This case has always been purely a question of factual determination which has been decided against the Petitioner. Even though the elements of actual malice are shown, the Respondent is a private figure and may recover without showing actual malice.

Therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 25 day of August 1987.

BY: Adele P. Grubbs

ADELE P. GRUBBS

Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for the Petitioner with Three Copies of the foregoing Brief in Opposition to Petitioners Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit by depositing said copies in the United States Mail with adequate postage affixed thereon, to:

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This 25 day of August, 1987

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